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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446

CREST SPECIALTY (NOT INC.), A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

BRIEF FOR PETITIONER.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

INTRODUCTION.

This cause is before this Court on writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, holding the Nudelman patent in suit (R. 131) valid as to claims 2 and 3.

OPINIONS OF THE COURTS BELOW.

The District Court's Findings of Fact and Conclusions of Law (R. 111) holding the patent in suit valid and infringed as to claims 2 and 3, are reported in 89 F. S. 199.

The opinion (R. 188) of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment (R. 119) of the District Court is reported in 184 F. 2d 577, 87 U. S. P. Q. 139.

JURISDICTION.

The date of the judgment (R. 188) to be reviewed is October 16, 1950. Rehearing denied November 9, 1950 (R. 193).

The writ of certiorari was granted by this Court February 26, 1951.

The jurisdiction of this Court is invoked under the Judicial Code, Section 240(a) as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347), and Section 5(b) of Rule 38 of this Court.

Unless otherwise noted, emphasis briefwriter's.

STATEMENT OF THE CASE.

Respondents, David C. Trager, doing business as Topic Toys, and Eoina Nudelman, filed suit against petitioner, Crest Specialty (Not Inc.), for infringement of claims 2 and 3 of the Nudelman patent, No. 2,455,266, issued November 30, 1948, on a Children's Amusement Device.

On January 19, 1950, the District Court filed its Findings of Fact and Conclusions of Law (R. 111) holding claims 2 and 3 in issue valid and infringed, and on January 26, 1950, entered judgment (R. 119) in favor of respondents.

By its decision (R. 188) dated October 16, 1950, the Court of Appeals for the Seventh Circuit in this case affirmed the judgment of the District Court holding claims 2 and 3 valid and infringed.

The patent in suit by its specification (R. 133) and drawings (R. 132) discloses, and claims 2* and 3** define, a children's amusement device comprising a figure formed to simulate a living creature attachable to a feeding bowl and

* Typical claim 2 reads as follows: An amusement device comprising a figure formed to simulate a living creature, said figure comprising a body portion adapted to be placed adjacent the exterior of a feeding bowl, said body portion having a forwardly extending portion adapted to extend closely adjacent to and overlie a portion only of said bowl, said forwardly extending portion having a simulated mouth and a passage, said passage having walls extending solely downward from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said simulated mouth and fall by gravity into said feeding bowl, said forwardly extending portion including means preventing lateral movement of said passage from over said bowl.

** Claim 3 is substantially identical to claim 2, with the exception that in claim 3 there is added to the structure of claim 2 a head secured to the forwardly extending portion of the body and movable to permit the contents of a spoon to be emptied into the mouth.

having a passage therein through which food taken from the bowl by a spoon and emptied into the passage may fall by gravity into the bowl. The feeding bowl *per se* is not a part of the patented structure. Respondents never sold the patented device separate and apart from a set (Plf. Exh. 4) consisting, in addition to the patented device, of a bowl not covered by the claims, nor separate and apart from a set (Plf. Exh. 3) consisting, in addition to the patented device, of an unpatented bowl, spoon, fork, and rack for the spoon and fork (R. 19-20).

Fig. 5, here reproduced, of the drawings of the Nudelman patent illustrates the claimed device mounted upon a feeding bowl.

Fig.5.

It is written in the specification of the patent in suit (R. 133, Par. 3) that "One of the objects of the invention is to provide an amusement device, attachable to the child's feeding bowl and having means whereby the device can be fed and the food returned to the bowl." By the use of such a device, it is claimed by Nudelman that a "mother can feed the child and the amusement device, thus providing a stimulant for the child to eat" (R. 133, col. 2, par. 3).

To accomplish such object, the trial court found (R. 112) that:

> "It was of the essence of Nudelman's concept that the device, employed for the purpose of providing instruction and encouragement for the child, simulate a living creature comprehensible to a child, and have body, head and mouth so that food could actually be fed to it, thereby creating the illusion of eating and thus stimulating, instructing, and encouraging the child to join the 'eating' table companion and to eat."

Respondents, when before the trial court and after admitting (R. 66) that had a design patent been taken out on such device instead of a mechanical patent, such design patent would have been invalid, argued that:

> "* * * it is very essential, in order to carry out Nudelman's concept, that you have a figure simulating a living creature, a living animal, so that you may put food into its jaws, which has the psychology of mimicry * * *."

As against the validity of the claims sued upon, petitioner cited and principally relied upon the prior art patent to Smith, No. 2,207,417 (R. 170) and to Theodoropulos, No. 1,792,129 (R. 158), the latter patent showing it to be old to hinge a head on a figure having a passage and formed to simulate a living creature.

The Smith patent by its specification (R. 171) and Fig. 4 of the drawing thereof (R. 170) discloses a bowl 6 to which a device 10', called a "hopper," is detachably connected. Such hopper is provided with a passage discharging into the bowl for the passage of food from the hopper into the bowl. A chart (Def. Exh. 2, R. 110) illustrating the device of typical claim 2 in suit in comparison with Fig. 4 of the Smith patent, is reproduced hereinafter opposite page 9. Fig. 4 of the Smith patent is exemplified by Def. Exh. 3-3a.

Smith by his specification (R. 171, Par. 4) points out that it was an object of his invention to provide a cereal dish

> "which due to the movement of the cereal into the

> liquid receiving portion, will interest a child eating cereal, in the operation of eating the same, to an extent that would not otherwise exist in children who do not particularly care to eat cereals of this character, thus aiding in feeding such children cereal by arousing their interest in the process of eating the same."

The Court of Appeals in this case in rejecting (R. 189), as did the trial court (F. F. 15b, R. 116), petitioner's contention that in view of the prior art, particularly the Smith patent (R. 170), the patent in suit by claims 2 and 3 did not spell out invention within the meaning of and as contemplated by the Revised Patent Statutes, Section 4886* (35 U. S. C. 31), said (R. 189-190):

> "The District Court found the device to be unique and ingenious, to constitute a genuine improvement over any prior device and to be the first to teach the idea of providing an eating table companion for a young child. It found further that the feeding of the companion with the same food and from the same bowl and the appearance of the animal apparently consuming food provide a stimulant for the child to do likewise, and that the device is useful and novel and reflects patentable invention.
>
> "In attempting to prove anticipation, defendants relied chiefly upon Smith No. 2,207,417, whose structure the court found, is not only entirely unlike that of

* R. S. 4886 (35 U. S. C. 31): "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

Nudelman but diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his. The other cited references are so far afield, as the court found and as we agree, that it is unnecessary to consider them. Upon all of the evidence submitted, the District Court found that anticipation had not been proved and that conception and production of a device such as that shown and described by Nudelman is beyond the skill of the mechanic and requires exercise of inventive genius.

"A careful examination of the evidence is convincing that the trial court had before it adequate substantial evidence to justify its findings. Upon the issue as to validity the facts are such as to bring the case within the scope of such decisions as *Paramount Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464, *Wahl Co.* v. *Andis Clipper Co.*, 66 F. 2d 162, *Pyle Nat. Co.* v. *Lewin*, 92 F. 2d 628 (CA-7), *Peckat Mfg. Co.* v. *Jacobs*, 178 F. 2d 794 (CA-7)."

In so concluding, it is petitioner's contention that the Court of Appeals in this case, as did the trial court, failed to take into account and follow the criteria of invention as announced by the decisions of this Court, particularly in *Cuno Engineering Corporation* v. *Automatic Devices Corporation*, 314 U. S. 84 at 91, 62 S. Ct. 37, 86 L. Ed. 58, 51 U. S. P. Q. 272, and *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 87 U. S. P. Q. 303.

SPECIFICATION OF ERROR.

The error urged by petitioner is that the Court of Appeals erred in sustaining the judgment of the trial court adjudging and decreeing claims 2 and 3 of the patent in suit valid.

ARGUMENT.

Had the Court of Appeals for the Seventh Circuit in This Case Applied the Criteria of Invention as Announced by this Court in Cuno Engineering Corporation v. Automatic Devices Corporation, 314 U. S. 84 at 91, 62 S. Ct. 37, 86 L. Ed. 58, 51 U. S. P. Q. 272, and in This Court's Most Recent Decision in The Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corporation (Decided December 4, 1950), 340 U. S. 147, 87 U. S. P. Q. 303, It Would Have Held Claims 2 and 3 of the Patent in Suit Invalid.

If it could be conceded that the purpose and function of the device of the Nudelman patent in suit, to-wit, that of enabling a mother to feed the child and the amusement device thereby to provide a stimulant for the child to eat (R. 133, Col. 2, Par. 3), was new and useful, as apparently the Court of Appeals in this case concluded,* such fact, under the decisions of this Court, is not alone sufficient to make this device patentable. In *Cuno Engineering Corporation* v. *Automatic Devices Corporation*, 314 U. S. 84 at 91, 62 S. Ct. 37, 86 L. Ed., 58, 51 U. S. P. Q. 272, it was succinctly stated by this Court that:

> "Under the Statute (35 U. S. C. 31; R. S. 4886) the device must not only be 'new and useful', it must also be an 'invention' or 'discovery'."

This Court went on to say (p. 91) that:

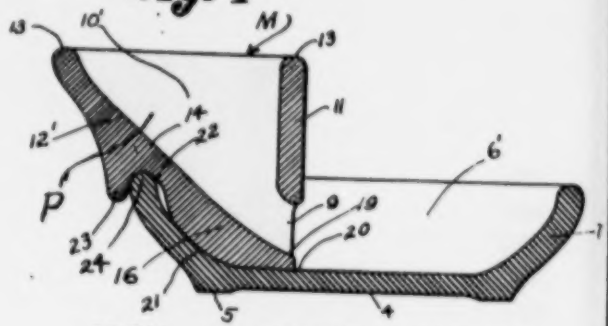
> "That is to say the new device, however useful it

* With respect to the Smith patent No. 2,207,417 (R. 170), the Court of Appeals in this case said (R. 190) that the disclosure thereof was "diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his [Nudelman's]."

Fig. 5.

PATENT 2,455,266 IN SUIT

Fig. 4



PRIOR ART PATENT 2,207,417
TO I.A. SMITH

CLAIM 2

An amusement device comprising

10 ..... a figure ~~formed to simulate a living creature~~, ... 10'

said figure comprising

16 ..... a body portion ..... 12', 23

adapted to be placed adjacent the exterior of

22 ..... a feeding bowl, ... 6'

said body portion having

27 ..... a forwardly extending portion 16

adapted to extend closely adjacent to and overlie a portion only of said bowl,

said forwardly extending portion having

32 ..... a ~~simulated~~ mouth ..... M

24 ..... and a passage, ... P

said passage having

25 ..... walls extending solely downward 14

from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said ~~simulated~~ mouth and fall by gravity into said feeding bowl,

said forwardly extending portion including

20 ..... means preventing lateral movement 22

of said passage from over said bowl.

> may be, must reveal the flash of creative genius, not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain."

Tested by this principle, the patentee Nudelman of the patent in suit did nothing to promote the arts and sciences as is a necessary and indispensable requirement of the right to a Constitutional grant of a patent monopoly.*

In this connection, the prior art Smith patent, No. 2,207,417 (R. 170), as does the patent in suit, has for one of its purposes that of amusing and stimulating a child to eat food against which it would otherwise rebel. It is written in the Smith patent (R. 171, l. 39, col. 1):

> "It is also *a purpose of my invention* to provide a cereal dish of the above mentioned character, which, due to the movement of the cereal into the liquid receiving portion, *will interest a child eating cereal in the operation of eating the same, to an extent that would not otherwise exist in children who do not particularly care to eat cereals of this character,* thus aiding in feeding such children cereal *by arousing their interest* in the process of eating the same."

Such object is accomplished by Smith by a structure which is substantially identical to that of the claimed device. This is crystal clear from the chart (Def. Exh. 2, R. 110) appearing opposite, illustrating a comparison between typical claim 2 of the patent in suit and the Smith disclosure.

Without exception, every element of typical claim 2 in issue is found, in the same relationship with respect to each other, in the Smith patent (R. 170). Such patent, like the Nudelman patent in suit, discloses a passage which, like that of the claimed device, leads to and discharges into

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* In Art. I, Sec. 8, of the U. S. Constitution, Congress is given the power "to promote the progress of science and the useful arts" by securing for limited terms to authors and inventors the exclusive rights to their respective writings and discoveries.

a bowl, thus enabling a mother, while using the Smith device in the feeding of a child, to take a spoonful of the contents of the bowl and deposit the same into the passage for gravitation back into the bowl. Identical means (20, Fig. 5 of Nudelman; 22, Fig. 4 of Smith—see chart, Def. Exh. 2, appearing herein) is employed by Smith and Nudelman to prevent lateral displacement of such passage from over the bowl.

While Smith preferred to form the device providing this passage, in the form of a hopper, the patentee Nudelman preferred to form his device to simulate a living creature. In this connection, the trial court in this case found that (F. F. 6, R. 112):

> "It was of the *essence of Nudelman's concept* that the device, employed for the purpose of providing instruction and encouragement for the child, *simulate a living creature* comprehensible to a child and have body, head, and mouth so that food could actually be fed to it, thereby creating the illusion of eating and thus stimulating, instructing and encouraging the child to join the 'eating' table companion and to eat."

Such Finding of Fact was prompted by the argument of respondents (R. 66) who, after admitting (R. 66, last par.) that had a design patent been taken out on the claimed device instead of a mechanical patent, such design would have been invalid, argued that:

> "* * * it is *very essential*, in order to carry out Nudelman's concept, that you have a *figure simulating a living creature*, a living animal, so that you may put food into its jaws, which has the psychology of mimicry * * *."

In carrying out such alleged concept, all that the patentee Nudelman of the patent in suit did was merely to bring forward from the prior art the old device of the Smith patent 2,207,417 (R. 170). As would be natural for any artisan skilled in his field, Nudelman formed, as taught

by the prior art, such old device to simulate a living creature, to attract the interest of a child and to encourage it to eat by the so-called process of mimicry. By so doing, the patentee has added nothing to the sum of useful knowledge. It was old in the art to form the handles of knives and forks to simulate living creatures to attract the attention of and to encourage a child to eat (see F. F. 8, R. 112, 113). Patent No. 1,751,773 (R. 152) to Trosper, disclosed a doll constructed in a manner whereby "a child may simulate feeding her doll or other figure." See also Patent Nos. 2,200,696 (R. 166) and 2,224,683 (R. 174) relating to child's coaxer dishes.

Having done nothing to promote the arts and sciences and having added nothing to the sum of useful knowledge, under the criteria of invention as announced by this Court in *Cuno Engineering Corporation* v. *Automatic Devices Corporation*, 314 U. S. 84 at 91, 62 Ct. 37, 86 L. Ed. 58, 51 U. S. P. Q. 272, to-wit:

> "* * * the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling, * * *"

the patentee Nudelman is not entitled to a right to a private grant on the public domain.

To petitioner's knowledge, the "flash of genius" test of invention as announced in the *Cuno* case, *supra*, has been followed and applied by every Court of Appeals with the exception of the Court of Appeals for the Seventh Circuit. Such Court has in a number of cases of recent origin made known that it has rejected* this "flash of genius" test of invention as announced in the *Cuno* case, *supra*.

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* *Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.*, 132 F. 2d 812 (C. A. 7), decided January 20, 1943.

National Slug Rejectors, Inc. v. *A. B. T. Manufacturing Corp.*, 164 F. 2d 333 (C. A. 7), decided October 17, 1947.

Falkenberg v. *Bernard Edwards Co.*, 175 F. 2d 427 (C. A. 7), decided June 21, 1949, was an appeal from the trial court's finding

In *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 87 U. S. P. Q. 303 (decided December 4, 1950), this Court set forth, as it did in the *Cuno* case, *supra*, its ideas as to the high standards which are to be used in judging what constitutes patentable invention. *The Great Atlantic & Pacific Tea Company* case was particularly concerned with a combination claim. Claims 2 and 3 of the Nudelman patent here in issue are combination claims. Such claims clearly define a device squarely within the definition of a "gadget", which, in the concurring opinion* in the case above re-

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that while the patented device was novel, presented genuine improvement, and had remarkable public acceptance, there was absent the flash of genius as described in the *Cuno* case. The 7th Circuit Court of Appeals in holding that the trial court erred in applying the "flash of genius" test, said (p. 428): "As we have done heretofore (*Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.*, *supra*), we reject the flash of genius test. We shall concentrate our scrutiny on whether in the claimed invention Falkenberg displayed more ingenuity than a workman skilled in his line of work."

Peckat Mfg. Co. v. *Jacobs*, 178 F. 2d 794 (C. A. 7), decided December 12, 1949.

Barie v. *Superior Tanning Company*, 182 F. 2d 724 (C. A. 7), decided June 16, 1950.

* In *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, Mr. Justice Douglas in his concurring opinion said:

> "Every patent is the grant of a privilege of exacting tolls from the public. The Framers plainly did not want those monopolies freely granted. The invention to justify a patent had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge. That is why through the years the opinions of the Court commonly have taken 'inventive genius' as the test. It is not enough that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance."

ferred to, it is said has "no place in the Constitutional scheme of advancing scientific knowledge."

The slight factual differences between this case and *The Great Atlantic & Pacific Tea Company* case do not distinguish the two cases and therefore makes applicable the same rule.

In *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 87 U. S. P. Q. 303, this Court has made the following statement which is especially applicable here:

> "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly."

And so, in the case at bar, the patentee Nudelman by merely forming an otherwise old device to simulate a living creature to attract the attention of a child and interest it in eating food, has added nothing to the total stock of knowledge but, as before stated, has merely exercised the skill of an artisan.

Long prior to the *Cuno* case, *supra*, this Court in *Hill* v. *Wooster*, 132 U. S. 693, at 700, laid down the rule that:

> "• • • it is not enough that a thing shall be new, in the sense that *in the shape or form in which it is*

produced, it shall not have been before known and that it shall be useful, but it must, under the Constitution and Statutes, amount to an invention or discovery."*

When the criteria of invention as announced by this Court in the *Cuno* case, *supra*, and *The Great Atlantic & Pacific Tea Company* case, *supra*, are applied to the claims in issue, the conclusion is inevitable that what the patentee Nudelman of the patent in suit did, did not constitute a patentable invention as contemplated by the Patent Statutes and the above referred to decisions of this Court.

CONCLUSION.

For reasons herein set forth and under the authorities stated, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed and the case remanded to the District Court for the Northern District of Illinois, with instructions to dismiss the complaint.

Respectfully submitted,

CREST SPECIALTY (Not Inc.),
Petitioner.

By CLARENCE E. THREEDY,
Its Attorney.

Chicago, Illinois,
March 12, 1951.

* The cases on this subject are collected in *Thompson* v. *Boisselier*, 114 U. S. 1, 11, 12.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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